SHUN CHEONG STEAM NAVIGATION CO. LTD. v. WO FONG TRADING CO.

[F.C. (Raja Azlan Shah, Chang Min Tat & Syed Othman F.JJ.) December 5, 1978 & May 26, 1979]

[Penang — Federal Court Civil Appeal No. 116 of 1978]

Shipping Law — Carriage of Goods by Sea — Limitation in bill of lading to liability not exceeding HK$300 — Invoice Value Clause — Contrary to Article IV, rule 5 Hague Rules — Liability of carrier under Hague Rules — Hague Rules Article IV, rule 5 and Article III, rule 8.

The appellants as shipowners carried two bales of raw medicine from Hongkong for the respondents in Penang. Only one bale was delivered. The respondents sued the appellants for the invoice value of the missing bale, which was valued at HK$5,170.90. Liability was admitted and the only question in dispute was the amount to be paid. The appellants relied on a clause of the bill of lading which limited liability to HK$300 unless otherwise agreed. The bill of lading was however issued subject to the Hague Rules. In the High Court it was held that the clause in the bill of lading was repugnant to the Hague Rules and was therefore null and void and of no effect. The learned trial judge then held that as there was no limitation of liability, the appellants were liable for the full value of the goods lost. The appellants appealed.

Held, allowing the appeal: as the learned trial judge had rightly held that the clause in the bill of lading was null and void, liability should be determined under Article IV, rule 5 of the Hague Rules and judgment should therefore be for £100 in gold for the respondents converted into Hongkong currency according to the rate of exchange prevailing on the day of the arrival of the ship at Penang, in accordance with Article X of the Hongkong Rules for the Carriage of Goods by Sea.

Cases, referred to:-

(1) *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.* [1959] A.C. 133 at p. 152.

(2) *Anthony Mordern & Sons Ltd.* v. *Commonwealth & Dominion Line Ltd.* [1917] 2 K.B. 420.

(3) *Foy & Gibson Proprietary Ltd.* v. *Holyman & Sons Proprietary Ltd.* (1946) 79 Lloyds L.R. 339.

(4) *Australasian United Steam Navigation Co.* v. *Hiskens* 18 C.L.R. 646.

(5) *Pendle & Rivett Ltd.* v. *Ellerman Lines Ltd.* (1927) 29 Lloyds L.R. 133.

(6) *Elder Dampster's Case* [1924] A.C. 522.

(7) *Vita Food Products Inc.* v. *Unus Shipping Co.* [1939] A.C. 277.

(8) *Pyrene Co.* v. *Scindia Steam Navigation Co.* [1954] 1 Lloyds L.R. 321; [1954] 2 Q.B. 402 at pp. 419-420.

(9) *Anticosti Shipping Co.* v. *St. Amand* [1959] S.C.R. 372; [1959] 1 Lloyds L.R. 352.

FEDERAL COURT.

Chandran Nair for the appellants.

P. Cumaraswamy for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The appellants as shipowners carried under a bill of lading two bales of raw medicine shipped by Pak Hing of Hongkong for the respondents, the consignees, in Penang. Only one bale was delivered. The respondents sued the appellants for the invoice value of the missing bale which turned out to be by far the more valuable of the two, being valued at HK$51,170.90 as against HK$5,115.63 for the other bale. Converted at the prevalent exchange rate at the time of the non-delivery and adding to it the survey fees, the sum claimed was M$25,595.13.

The claim for the invoice value and disbursements was sounded on clause 13 of the bill of lading which in its relevant parts reads:

"13. . . . Subject to the limitation expressed in clause 7 above, the Company's liability in case of loss or damage to goods for which they may be responsible within the limits of this Bill of Lading, to be calculated on and in no case to exceed the net invoice cost and disbursements."

Liability was admitted at the trial and the only question before the High Court was the amount to be paid. Specifically, the defence denied that the invoice value was payable and relied on clause 7 of the bill of lading which reads:

"7. The owners of the vessel will not be accountable for money, documents, gold, silver, bullion, specie, jewellery, precious stones or metals, work of art or other precious articles, nor for any one package of cargo above the value of HK$300 (Hong Kong Dollars Three Hundred), unless the Bill of Lading be signed therefor with the nature and value therein expressed at the time of shipment and extra freight in respect of same agreed upon and paid. Delivery of specie and valuable shall be taken from the ship's deck, where the carrier's liability shall cease."

for the contention that the appellants were only liable to pay HK$300 in view of the failure, which the respondents had never denied, on their part to declare the nature and the value of the goods.

Hongkong however is one of those countries which have adopted the Brussels Convention of 1923 and its Carriage of Goods by Sea Ordinance, 1928 (HK COGSO) makes applicable the Carriage by Sea under Bills of Lading Rules, more familiarly known as the Hague Rules, in relation to and in connexion with the carriage of goods by sea in ships carrying goods from any port in the Colony to any other port whether in or outside the Colony. Section 4 makes it a statutory requirement that every bill of lading or similar document of title issued in the Colony shall contain an express statement generally described as the paramount clause, that it is to have effect subject to these rules. The bill of lading in the instant case was clearly endorsed with the words that it was issued subject to the terms provisions and conditions of the HK COGSO in compliance with section 4 thereof. The law applicable is therefore the *lex loci contractus* and is the law of Hongkong. It is however common to both parties and we ourselves are satisfied that the HK COGSO is in all material particulars identical with our Malaysian COGSO, 1950 and that the Hague Rules annexed to the ordinance in each case are the contractual terms of the relationship between the parties: see *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.*[1] at page 152.

We now set out the rules relevant to this case.

Article II entitled Risks reads as follows:

"Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth."

As we read it, the carrier is entitled to expect from the shipper compliance with the requirements of the Hague Rules before he is subject to the responsibilities and liabilities set out in the rules.

Next, Article IV, rule 5, which reads:

"5. (1) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding £100 per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence but shall not be binding or conclusive on the carrier.

(2) By arrangement between the carrier or the master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided that such maximum shall not be less than the figure above-named.

(3) Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connexion with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading."

On a proper interpretation, where the shipper neither has declared the nature and value of the goods nor has it inserted in the bill of lading, then the carrier shall not be liable to pay a sum exceeding £100. It follows clearly that (1) where the value of the package is less than £100, the shipper will be entitled to be reimbursed with the actual value of the package lost or damaged, (2) where it is worth exactly £100, then this sum of £100 and (3) where it is worth more than £100, by however much, then £100 and no more. If the shipper desires to claim more than £100, either he has to agree with the carrier to fix a higher maximum or he has to declare the nature and value of the goods and to have it inserted in the bill of lading. The declaration, from the nature of things, must first come from the shipper. It serves as notice to the carrier of need for additional care in the carriage of the goods in question and must therefore be made before a higher liability can be fixed on the carrier. The respondents here had not declared the nature and value of the goods nor had it inserted in the bill of lading.

The £100 which Article IX declares to be of gold value is irreducible and Article III rule 8 enacts that any lessening of the carrier's liabilities under the rules shall be null and void and of no effect. This rule reads as follows:

"8. Any clause, covenant or agreement in a contract or carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability."

The HK$300 in clause 7 of the bill of lading is certainly much less than £100 sterling.

The High Court in Penang (Arulanandom J.) had no difficulty in coming to the decision that this clause 7 is repugnant to the Hague Rules and is null and void and of no effect. Exemption of accountability for any one package above the value of HK$300 of which the nature and value had not been declared or expressed in the bill of lading is clearly a lessening of liability under Article IV rule 5 and is forbidden by Article III rule 8.

The learned trial judge then went on to hold that "it follows, then, that the defendants have in no way limited their liability to the plaintiffs for loss or damage to the plaintiffs' goods and would therefore be liable to the plaintiffs for the full value of the goods lost." How one offending clause in the bill of lading led consequentially and inevitably to avoiding the provisions of another clause which the former offended, or nullified a term of the contract of affreightment which was incorporated by statute and by contract, viz. Article IV, rule 5, was never reasoned out, but reliance was had entirely to two cases, *Anthony Hordern & Sons Ltd.* v. *Commonwealth & Dominion Line, Ltd.*[2] and a decision of the then Australian Court of Appeal in *Foy & Gibson Proprietary Ltd.* v. *Holyman & Sons Proprietary Ltd.*[3] It remains to be seen whether this reliance was correct.

Anthony Hordern's case, a decision in 1917, that is before the ratification and accession by Hongkong of the Hague Rules on December 2, 1930, is a decision clearly not on the Hague Rules but on the Harter Act, an Act of the Congress of the United States. The judgment under appeal sets out fully the headnotes. The first part of the headnotes summarises the Harter Act, the second part the decision which was to the effect that a clause in the bill of lading limiting the accountability or liability of the shipowner to not more than £100 for any one package was null and void as against the Harter Act and judgment was given in favour of the shipper for the full value of £240 12s 7d for the package that was not delivered.

In *Foy & Gibson's* case, a clause, Clause 14, in the bill of lading which provided that the carrier was not accountable beyond the mutually agreed value of £5 for each package or parcel receipted unless otherwise stated in the bill of lading was held by all the five judges not to be in conflict with Article III rule 8 but to be repugnant to Article IV rule 5, Hague Rules. The judgment of the court of first instance in awarding the shippers the full value of the goods lost was therefore upheld.

Now a decision of the High Court of England or of the Court of Appeal of Australia, though not binding on us, is of strongest persuasion. The two cases were regarded by the High Court at Penang as authority for the simple and uncomplicated proposition that where the limitation clause is struck out, then the carrier becomes liable for the full value of the goods lost or damaged. On the strength of the authority of these two cases the High Court therefore awarded the full invoice value of the package that was lost. It was considerably in excess of the ordinary limit of £100 sterling in Article IV rule 5.

But with the greatest of respect, *Anthony Hordern* is authority for a case involving the Hague Rules only if the Harter Act is *in pari materia* with or contains provisions similar to those in the Hague Rules. But it is clear from a reference to the text of the Harter Act (see *Tetley's* Marine Cargo Claims, 2nd Edition, at pp. 550-1), that while there was a provision in section 1 making it unlawful to relieve the shipowner from liability for loss or damage arising for negligence or default, there was no clause or provision similar to Article IV rule 5 which limits the liability of the shipowner to a sum not exceeding £100 unless the shipper had declared the actual value thereof or negotiated for a higher maximum. *Anthony Hordern's* case is therefore no authority whatsoever for a case on the

shipowner's liability under Article IV rule 5. Clearly, cases like this brought about the realisation that the statutory provision invalidating any limit to the shipowner's liability must be matched by a requirement on the part of the shipper to declare his goods if of an exceptional value and it is this realisation which sees the justice of limiting the shipper's claim if he fails to declare a value above the maximum and which is now enacted in Article IV rule 5.

Foy & Gibson's case, on the other hand, is a case on the Hague Rules but obviously, it is only an authority for what it actually decides on the facts pertinent to it. The bill of lading incorporated the paramount clause. The one glaring fact is that the value of the package lost was below £100. With great respect, it is therefore no authority for any proposition that where a limitation of liability clause in the bill of lading is repugnant to Article IV rule 5 and therefore null and void, the shipper was entitled to recover the full and real value *whatever the value of the goods lost*, in the absence of any declaration of value and insertion in the bill of lading. It is of the greatest importance to appreciate that the real value or the value claimed of the carton of underwear lost in this case was only £57 12s 7d which the shipper was therefore bound to pay upon failure to deliver, being a sum not exceeding £100 in the relevant rule. Once this is appreciated it becomes transparently clear that the true proposition is that the shipowner is entitled to recover the real value where it does not exceed £100 and £100 whatever its real value is, if above £100, in the absence of any declaration of value and insertion in the bill of lading or in the absence of any negotiation for a higher maximum. The headnotes of the report of this case are to that extent misleading. This case does not aid the respondents in their claim for a sum grossly in excess of £100.

Clearly, where the bill of lading contains a clause repugnant to the Hague Rules which are required statutorily to be and which have by agreement been incorporated in it, the repugnancy is only to the extent of this offending clause but the rules are in all cases to be applied. The statutory requirements are contained in section 4 COGSO which reads as follows:

"4. Every bill of lading or similar document of title issued in Hongkong which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Ordinance."

The contractual provisions are in the paramount clause which has been expressly stated in the bill of lading.

That the bill of lading is to apply the Hague Rules is clear from the following passages from the several judgments in *Foy & Gibson's* case itself:

Per Latham C.J. at page 342:

"The carrier can protect himself by requiring a declaration of the nature and value of the goods and inserting it in the bill of lading. He is entitled to do this — see *Riley* v. *Horne*, 5 Bing. 217 quoted by Isaacs, J., in *Australasian United Steam Navigation Company, Ltd.* v. *Hiskens*, 18 C.L.R. 646, at pp. 678-9. *If he does not do so, Art. IV, Rule 5, applies in his favour and he is entitled to refuse to pay more than £100 in respect of any package or unit, unless a greater amount of maximum liability has been agreed between the parties.* But in the absence of a declaration of the nature and value of the goods, the parties cannot make a valid agreement fixing maximum liability at less than £100."

Per Starke J. at page 343:

"Now, that clause protects the carrier and the ship: it is the measure of the carrier's and the ship's liability unless the nature and value of the goods shipped be declared. But by agreement another maximum may be fixed, provided that the maximum shall not be less than the figure already named — namely, £100 (gold value)."

Per Dixon J. (as he then was) at the same page:

"An analysis of Rule 5, shows that its primary purpose is to restrict the liability of the carrier and ship for loss or damage in point of amount. The amount to which the liability is restricted is calculated with reference to the package or unit and is fixed at £100 in gold sterling per package or unit. The restriction is expressed as a general proposition, that is to say, not in reference to the particular goods made subject to a given bill of lading. There is no definite article before the word 'goods', and the qualification which follows contemplates, as an exceptional case, the specific declaration of the nature and value of the goods. That qualification expresses the secondary purpose, and that is *to allow the shipper to escape from the restriction by pursuing a course which will unmistakably fix the carrier with knowledge of the nature and value of the specific goods and acceptance of prima facie responsibility for them on that footing.* Before shipment the nature and value of the goods must be declared by the shipper and he must have them inserted in the bill of lading."

Per Williams J. at page 347:

"The Rule contemplates three events: (1) a right in the carrier to limit his liability to £100, unless the shipper declares the nature and value of the goods and the declaration is inserted in the bill of lading; (2) a right in the shipper upon such a declaration and insertion, in the absence of agreement to the contrary, to recover the true value of the goods; (3) a right in the parties to agree that, whatever the nature and true value of particular goods, and whether or not this nature and value are declared and inserted in the bill of lading, the goods shall be agreed, for the purpose of liability, not to exceed a certain value, provided that this value is not less than £100."

It is therefore evident that under the Hague Rules, where the shipper has declared the nature and value of the goods and the value has been written into the bill of lading or where he has negotiated for a higher maximum, he is only then entitled to be compensated for the negligence of the carrier by the actual value or the higher maximum as the case may be. He would not naturally declare a value higher than £100 or negotiate for a higher maximum if in fact his goods are exactly of this sum of £100 or below, since the increased freight that reasonably goes with a higher value would then have to be paid. In such a circumstance, he would be paid the actual value of the goods if below the value of £100 or the maximum of £100 if the value of the goods is equal to or exceeds this sum. As has been observed by Isaacs J. in *Australasian United Steam Navigation Co.* v. *Hiskens*[4] at page 678:

"If he (the shipper) does not state their value above that sum, it is an admission that they are not worth more. He has a fair option, so long of course as the extra freight is not unreasonable. It is not an exemption from liability: it is an agreement as to value made between the owner who knows and the carrier who does not and the freight is proportionate to the value."

This passage referred to the limitation of liability but could with equal force be applied to the maximum limit under the Hague Rules for undeclared goods. If the shipper does not state the value of the goods above the sum of £100, is it not an admission that they are worth less? He knows but the carrier does not know, the actual value of the goods. He should there-

fore be provident and abide by the Hague Rules by declaring the actual value of the goods if above £100 per package and having it written into the bill of lading. If he failed to do both then he would not get more than the £100 maximum in Article IV rule 5. Thus in *Pendle & Rivett Ltd.* v. *Ellerman Lines Ltd.*,[5] though the shipper had stated that the bale of silks and woollens was valued at £256 8s 1d but had failed to have the value inserted in the bill of lading, he recovered the maximum of £100 sterling only.

To hold otherwise would be to treat the Hague Rules and section 4 of the COGSO inoperative and to regard the carrier as bald bailees. But to apply the words of Lord Sumner in the *Elder Dempster's* case,[6] at page 564 which Lord Wright applied in his judgment in *Vita Food Products Inc.* v. *Unus Shipping Co.*[7] at page 300:

"There is not here a bald bailment with unrestricted liability or tortious handling independent of contract. Such a view would be a travesty of fact. Hence even on that footing, the respondent would fail, either because it was party to an illegality avoiding the contract or alternatively because the contractual exemptions could not be ignored."

Where no bill of lading has been issued but one is contemplated, the position is the same. *Per* Devlin J. in *Pyrene Co.* v. *Scindia Steam Navigation Co.*[8] at page 329:

"In my judgment whenever a contract of carriage is concluded and it is contemplated that a bill of lading will in due course be issued in respect of it, that contract is from its inception 'covered' by a bill of lading and is therefore from its inception a contract of carriage within the meaning of the Rules and to which the Rules apply."

The Supreme Court of Canada followed *Pyrene's* case in *Anticosti Shipping Co.* v. *St. Amand*[9] and applied the $500 per package limitation, although no bill of lading was issued. As Rand J. said so succinctly in delivering the opinion of the Supreme Court of Canada at page 358:

"The responsibility for seeing that the value of the thing shipped is declared and inserted on the bill is on the shipper and any consequential hardships must be charged against his own failure to respect that requirement."

It only remains to consider whether the invoice value provision in clause 13 of the bill of lading, *supra*, justifies the judgment that has been given in favour of the respondents. We have not been advised whether Hongkong has followed other countries in declaring an invoice value clause null. We understand Malaysia has not done so. But nevertheless the position is quite clear. This clause, in relation to the value of the missing bale, is not on the facts invalid under Article IV rule 5 since it does not reduce the carrier's liability to less than the per-package limitation, but it is contrary to Article III rule 8, being a "clause ... relieving the carrier or the ship from liability for loss ... otherwise than as provided in this Article," and therefore void. This clause cannot justify a judgment for the full invoice value and override the rules.

The appeal is allowed with costs here. The judgment of the High Court is set aside and substituted by one for £100 in gold for the respondents converted into Hongkong currency according to the rate of exchange prevailing on the day of arrival of the ship at Penang, in accordance with the provision of Article X of the Hongkong rules. Having regard to the arguments in the court below, we consider that the correct order, with regard to costs there, will be that each party do bear its own costs in the High Court.

Appeal allowed.

Solicitors: *Chandran & Co.; Shook Lin & Bok.*

TED BATES (M) SDN. BHD. v. BALBIR SINGH JHOLL

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. and Abdul Hamid J.) March 20 and June 2, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 142 of 1976]

Practice and Procedure — Application to sign final judgment — Refund of deposit — Letter without prejudice — R.S.C. 1957, O. 14 & O. 32 r. 6.

Contract — Void contract — Restitution — Contracts Act, 1950, ss. 65, 66, 71, 74 & 76.

The appellants had applied for leave to sign final judgment against respondent for the sum of $250,000 being refund of deposit. The appellants alleged that the money had been given to the respondent to assist him to acquire certain premises in Kuala Lumpur. In return for the financial assistance the respondent had agreed to lease the premises to the appellants for a period of ten years, the money paid to be treated as advanced payments for the rental. Subsequently the appellants exercised their right to terminate the agreement and claim refund of the money they had paid. The respondent had admitted owing the money and asked for time to repay but his letter was not marked "without Prejudice". The Senior Assistant Registrar gave leave to sign final judgment under Order 32 r. 6 of the Rules of the Supreme Court but the order was set aside by the learned judge in the High Court. The appellants appealed.

Held: the application should have been dealt with under Order 14 and not under Order 32 rule 6. In the circumstances the proper order to be made would be that the respondent be given leave to defend conditional upon his paying into court the sum of $250,000.

Cases referred to:-

(1) *Gore* v. *Gore* [1964] M.L.J. 184, 186.

(2) *Hampden* v. *Wallis* (1884) 27 Ch. D. 251.

(3) *Ellis* v. *Allen* [1914] 1 Ch. 904.

(4) *Menaka* v. *Lum Kum Chum* [1977] 1 M.L.J. 91, 94.

FEDERAL COURT.

S.D.K. Peddie for the appellants.

C. Abraham for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (read by Wan Suleiman F.J., as judgment of the Court): This appeal is concerned with certain interlocutory proceedings. By a summons-in-chambers dated June 18, 1976 appellants applied for leave to sign final judgment against respondent for the sum of $250,000 being refund of deposit. It was clearly an application under O.14. However, after hearing counsel for appellants, the Senior Assistant Registrar gave leave to sign final judgment under O.32 r.6 which reads:—

"Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other ques-